UNITED STATES OF AMERICA

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

West Penn Power Company) Docket No. EL95-30-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued May 8, 1995)

On March 10, 1995, West Penn Power Company (West Penn) filed a Petition for Issuance of a Declaratory Order (West Penn Petition). West Penn seeks a declaration by the Commission that certain actions by the Pennsylvania Public Utility Commission (Pennsylvania Commission) and Washington Power Company, L.P. (Washington Power) violate section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[1] and this Commission's implementing regulations. Specifically, West Penn argues that under federal law: (a) an electric utility cannot required to purchase capacity from a qualifying facility (QF)[2] at rates that exceed the utility's current avoided costs; (b) a State regulatory authority may not modify a power purchase agreement privately negotiated between an electric utility and QF or,

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1 16 U.S.C.A. § 824a-3 (West 1985 & Supp. 1995).

2 A QF is a cogeneration or small power production facility that meets certain specified criteria, primarily relating t technical aspects and ownership, under PURPA and our implementing regulations. See 16 U.S.C.A. §§ 796(17)-(18) (West 1985 & Supp. 1995); 18 C.F.R. Part 292 (1994). If all of the relevant statutory and regulatory criteria are satisfied, a QF may be both a qualifying cogeneration facility and a qualifying small power production facility. See id.

alternatively, avoided costs must be recalculated as of the time of such modification; and (c) avoided costs must be recalculated if a QF seeks certification of a new project design Finally, West Penn requests a determination that it has no current obligation to purchase capacity and energy from Washington Power's QF.

As described below, we deny West Penn's petition for declaratory order. The Pennsylvania Commission, and the courts, have determined that a valid, legally binding contract exists in this case. We will not disturb that contract. However, we would encourage the parties to the contract to consider settling their differences at this stage particularly if, as may be the case, the facility has not been constructed.

I. Background

A. Statutory and Regulatory Background

We have had occasion in several recent cases to summarize the basic components of section 210 of PURPA and our implementing regulations.[3] There are several provisions, discussed below, that are pertinent to the issues raised in this proceeding.

Under PURPA and our implementing regulations, the rates at which an electric utility is required to purchase a QF's capacity and energy may not exceed the utility's

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3 See, e.g., New York State Electric & Gas Corp., 71 FERC ¶ 61,027 (1995) (NYSEG), slip op. at 1-3; Southern California Edison Co., 70 FERC ¶ 61,215 at 61,676-77 (1995) (Southern California Edison); Connecticut Light & Power Co., 70 FERC ¶ 61,012 at 61,023-24, reconsideration denied, 71 FERC ¶ 61,012 (1995), appeal docketed sub nom. Niagara Mohawk Power Corp. v. FERC, No. 95-1222 (D.C. Cir. Apr. 24, 1995) (Connecticut Power).

avoided costs.[4] Our regulations expressly provide, however, that if the QF is providing energy or capacity "pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term," the rates may be based (at the QF's election) on the purchasing utility's "avoided costs calculated at the time the obligation is incurred."[5] Moreover, the regulations further stipulate that rates calculated as of such time will meet the statutory and regulatory standards even if they "differ from avoided costs at the time of delivery."[6] Finally, for most QFs, section 210(e) of PURPA and the Commission's regulations provide for exemptions from regulation under the Federal Power Act (FPA), the Public Utility Holding Company Act and state law--including exemptions from utility-type rate regulation under the FPA and under state law.[7]

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4 See 16 U.S.C. § 824a-3(b) (1988); 18 C.F.R. § 292.304 (a) (2) (1994).

5 18 C.F.R. § 292.304(d)(2) (1994).

6 18 C.F.R. § 292.304 (b) (5) (1994).

7 16 U.S.C.A. § 824a-3(e) (West 1985 & Supp. 1995); 18 C.F.R. §§ 292.601(c), 292-602(c)(i) (1994).

B. Factual-Background[8]

Washington Power is building a cogeneration and small power production QF located near Burgettstown, Pennsylvania (Facility).[9] On October 15, 1987, after more than one year of negotiations, West Penn and Washington Power entered into an Electric Energy Purchase Agreement (Purchase Agreement) for sale of the capacity and energy of the Facility to West Penn.[10] The Purchase Agreement is for a 33-year term and originally contemplated that sales of capacity and energy from the Facility to West Penn would commence on October 1, 1991 (but also included provisions addressing the parties, rights and obligations in the event of later commencement dates). The rates are comprised of various components, including a capacity cost originally set at $0.036 per kilowatt (kW) hour, which was below West Penn's avoided costs calculated as of October 1986.[11]

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8 Our description of the factual background is derived primarily from the West Penn Petition, the Protest and Request for Dismissal of Washington Power, filed April 3, 1995 (Washington Power Protest), and the Protest and Motion to Dismiss of the Pennsylvania Commission, also filed April 3, 1995 (Pennsylvania Commission Protest). The relevant facts, particularly as to the extensive litigation that has preceded the filing of the West Penn Petition, are lengthy and convoluted but for the most part are not in dispute. We set forth the factual background prior to summarizing the pleadings, because we believe that acquaintance with the long-running prologue to the instant proceeding is essential to understanding the parties, positions here.

9 In North Branch Energy Partners, L.P. 42 FERC ¶ 62,240 (1988) (Cogeneration Certification), the Commission certified the Facility as a qualifying cogeneration facility. In Washington Power Co., L.P., 69 FERC 62,119 (1994) (Small Power Production Certification), the Commission also certified the facility as a small power production facility. The Commission recently recertified the Facility as a qualifying cogeneration facility. See Washington Power Co., L.P., 70 FERC ¶ 62,168 (1995) (Cogeneration Recertification). In each case, the Commission certifications were issued pursuant to delegated authority. 18 C.F.R. 375.308(b)(4) (1994).

The Purchase Agreement further provides for certain "milestone" dates by which certain events in the development of the Facility were to be completed, failure to comply with which would effect a termination of the Purchase Agreement. Among the milestones is completion of construction financing for the Facility, the date for which was originally set at October 1, 1989. The conditions precedent for completion of financing include obtaining the requisite regulatory approvals, among which are the Pennsylvania Commission's acceptance of the Purchase Agreement and its approval for West Penn's passing through to its customers the rates payable to Washington Power.[12]

Whether construction of the Facility actually has begun appears to be in dispute. Washington Power asserts in this proceeding that it has commenced construction. Washington Power Protest at 33 & n.11. Additionally, in its application for certification of the Facility as a small power production QF, Washington Power represented that construction began in July 1994. See 69 FERC at 64,296. West Penn, however, asserts that the Facility is "unbuilt" and argues that the Commission's failure to grant the relief sought by West Penn "may result in construction" of the Facility. West Penn Petition at 11. Several intervenors expressly allege that Washington Power has not yet commenced construction of the Facility. We need not and do not make any determination as to the accuracy of the competing allegations on this point.

[10] The Purchase Agreement, which is Exhibit D to the West Penn Petition, was executed by North Branch Energy Partners, L.P., which was Washington Power's name at that time. For convenience, we will refer to the developer of the Facility as Washington Power throughout this order.

[11] While West Penn avers that only the capacity rate is at issue in this proceeding, West Penn Petition at 4, it nonetheless elsewhere appears to request from the Commission a determination that no purchase obligation of any type exists between West Penn and the Facility. See id. at 38.

[12] See Purchase Agreement §§ 5.3(9), (f).

On January 5, 1988, West Penn submitted the signed Purchase Agreement to the Pennsylvania Commission for approval. The Pennsylvania Commission initially approved the Purchase Agreement as executed in an order dated July 8, 1988. The Pennsylvania Commission's first approval did not entail any modification of the Purchase Agreement, including the capacity charge and milestone dates to which West Penn and Washington Power originally agreed. Thereafter, a lengthy course of litigation ensued before the Pennsylvania Commission and the Pennsylvania courts, culminating in an unsuccessful petition for certiorari filed by West Penn with the United States Supreme Court. We will not here describe all of the subsequent decisions of the Pennsylvania Commission and the Pennsylvania courts. Instead, our description is limited to those aspects of the various orders that are pertinent to the issues raised in the West Penn Petition.[13]

C. West Penn Petition

In its petition, West Penn requests that the Commission address several issues concerning an electric utility's obligations to purchase QF power, particularly regarding the appropriate point or points at which to calculate the utility's avoided costs. Specifically, West Penn asks this Commission to declare that under federal law:

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13 While the parties disagree as to the effect and proper interpretation of the earlier decisions, the actual orders of the Pennsylvania Commission and the Pennsylvania courts are, of course, matters of record, with most of the court decisions having been published in official reporters. In any case, copies of nearly all of the orders involving the Facility also are contained in Exhibit F to the West Penn Petition. Exhibit F is the Appendix to West Penn's petition for certiorari to the United States Supreme Court, filed in Docket No. 94-7 on July 1, 1994. The most recent order of the Pennsylvania Commission, dated December 16, 1994, is Attachment A to the Washington Power Protest.

(1) An electric utility may not be required to purchase capacity from a QF when, as West Penn alleges is the case here, (a) the rates exceed the utility's current avoided costs, (b) the rates are based upon stale avoided cost data, (c) the utility no longer needs the capacity and (d) the QF is unbuilt;

(2) (a) A State regulatory authority may not modify material terms of a privately negotiated power purchase agreement between a utility and a QF; or (b) if the contract is so modified, the utility must be allowed to demonstrate that the contract's purchase price exceeds the utility's avoided costs as of the time of the modification;

(3) Avoided costs must be redetermined when a QF materially changes its project or seeks certification of a new project design; and

(4) West Penn has no current purchase obligation from Washington Power's QF facility.[14]

West Penn argues, first, that PURPA's setting as the maximum rate for QF power "the incremental cost to the electric utility of alternative electric energy"[15]--i.e., avoided costs-means that the purchase price never can exceed the utility's current avoided costs at any time during the term of the purchase agreement. West Penn initially suggests that

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14 See West Penn Petition at 1-2, 37-38.

15 16 U.S.C. § 824a-3(b) (1988).

the Commission's regulations under PURPA, by permitting rates to be based on avoided costs to be calculated as of the time the utility incurs a legally enforceable obligation to purchase a QF's power and by explicitly recognizing that such rates are permissible even if they differ from the utility's avoided costs at the time of actual delivery of the QF's power and capacity, create an ambiguity concerning whether a QF can "lock in" long-term rates for the entire life of a contract even if such rates turn out later to exceed the utility's actual avoided costs. West Penn asserts that if such provisions of the Commission's PURPA regulations in fact permit purchase rates that exceed avoided costs on a long-term basis, those regulations "are, and always have been, in clear violation of the express terms of PURPA § 210."[16]

West Penn then suggests, however, that the Commission never intended that its regulations be so interpreted. In support, West Penn asserts that while the regulations provide that avoided costs may be calculated "prior to the beginning of [a] specified term,"[17] the Commission never has suggested that the "specified term" of a purchase agreement between an electric utility and a QF might be several decades. West Penn infers that 11[p]resumably, the Commission realized that avoided costs could vary significantly over time, and that long-term purchase rates premised on avoided costs should be subject to correction if circumstances changed materially."[18]

West Penn construes our recent orders in Southern California Edison and Connecticut Power as providing additional support for its argument that the Commission

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16 West Penn Petition at 22.

17 18 C.F.R. § 292.304(d)(2) (1994).

18 West Penn Petition at 23.

should abrogate West Penn's 1987 Purchase Agreement with Washington Power because the rates allegedly exceed West Penn's current avoided costs. West Penn quotes, for example, our statement in Southern California Edison that "[w]e believe it is inconsistent with our obligation under PURPA to ensure just and reasonable rates, and our goals to encourage development of competitive bulk power markets, to permit the use of PURPA to create new contracts that do not reflect market conditions for new bulk power supplies."[19] West Penn further notes the Commission's concerns, expressed in dicta in Southern California Edison, about the need for the capacity and the staleness of the data at issue in that case. West Penn adds that the Commission held in Connecticut Power that, contrary to suggestions in the preamble to our § 210 regulations, states have no authority under PURPA to authorize rates that exceed avoided costs. "Both opinions," West Penn concludes, "strongly suggest that the avoided cost cap must be strictly enforced."[20]

West Penn's second argument is that the Pennsylvania Commission had no authority to modify the Purchase Agreement, because it was a privately negotiated agreement between an electric utility and a QF and thus protected by our PURPA regulations from any modifications by the Pennsylvania Commission.[21] In support, West Penn quotes section 292.301(b) of this Commission's PURPA regulations:

Nothing in this subpart:

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19 Id. at 24 (quoting 70 FERC at 61,676).

20 West Penn Petition at 25.

21 See id. at 26-29

> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or
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> (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.[22]

West Penn construes section 292.301(b) of our PURPA regulations as not only authorizing utilities and QFs to make their own contractual arrangements independent of our PURPA regulations but also as precluding State regulatory authorities from ordering modifications to utilities, contracts with QFs. West Penn argues in particular that the Pennsylvania Commission violated section 292.301(b) by changing certain milestone provisions, which West Penn claims it negotiated for its protection, while enforcing a purchase price based on allegedly stale data.

Alternatively, West Penn argues, if PURPA permits a State regulatory authority to modify a privately-negotiated utility/QF contract, the purchase price must be based upon the utility's avoided costs as of the time of the modification.[23] In support, West Penn opines that until the date of the modification, the QF has no legally enforceable obligation to deliver power.

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22 18 C.F.R. § 292.301(b) (1994). The "subpart" to which the above-quoted language refers is Subpart C of the Commission's PURPA regulations. Subpart C governs arrangements between electric utilities and QFs under section 210 of PURPA, including arrangements for utilities' purchases from QFs.

23 See West Penn Petition at 29-31.

Finally, West Penn claims that, because Washington Power obtained dual certification of the Facility as a qualifying small power production facility after its initial certification as a qualifying cogeneration facility, the Purchase Agreement is void and West Penn has no obligation to purchase capacity from the Facility.[24] West Penn argues that Washington Power's proposed small power production facility is substantially different from the proposed cogeneration facility that the parties contemplated when they signed the Purchase Agreement in 1987 and that it neither has agreed, nor has been ordered by the Pennsylvania Commission, to purchase capacity from Washington Power's proposed, allegedly redesigned, small power production facility. West Penn urges that if and when it is required to purchase capacity from Washington Power's small power production facility, the rates must be calculated as of the date that Washington Power incurs a legally enforceable obligation to deliver the capacity. In West Penn's view, that date as of which the purchase rate must be calculated could only be some future date upon which the Pennsylvania Commission orders West Penn to purchase power from the small power production facility certified by this Commission.

Notice of the West Penn Petition was published in the Federal Register,[25] with protests and motions to intervene originally due on or before April 3, 1995. By notice of the Commission issued on March 3, 1995, the due date for protests and interventions was extended to April 5, 1995.

D. Response of Washington Power

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24 See id. at 32-37. See also supra note 9 (citing Commission's QF certification orders for Facility).

25 60 Fed. Reg. 14,741 (1995).

Washington Power filed a motion to intervene on March 30, 1995, and followed, on April 3, 1995, with the Washington Power Protest, which contains its substantive arguments against the West Penn Petition. After summarizing what it regards as the salient aspects of the Purchase Agreement and the prior legal proceedings, Washington Power argues, first, that the West Penn Petition must be dismissed on the grounds of res judicata. Washington Power asserts that this case satisfies all of the requirements for application of the res judicata doctrine as adopted by the Commission in Greensboro Lumber Co. v. Rayle Electric Membership Corp., 40 FERC ¶ 61,283 (1987) (Greensboro). Specifically, Washington Power urges, the West Penn Petition involves the same cause of action, the same parties and the same issues that were raised or that could have been raised in the prior proceedings before the Pennsylvania Commission, the Pennsylvania courts and the United States Supreme Court. Washington Power contends that West Penn, having had its arguments consistently rejected in all of the prior litigation, should not be permitted to resurrect its arguments before the Commission, thereby "being offered yet another bite at the apple."[26]

Washington Power's second argument is that, even if res judicata did not bar the West Penn Petition, West Penn's claim that changed circumstances entitle it to avoid its obligations under the Purchase Agreement still provide no basis for the Commission to grant the requested relief. Washington Power's argument on this point is two-fold. First, Washington Power asserts that the Commission has no jurisdiction to invalidate the Power Agreement and its rates because under our regulations issued pursuant to section 210(e) of PURPA, QFs are exempt from utility-type regulation, including such regulation under both state law and the FPA. Thus, Washington Power concludes, once the State

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26 Washington Power Protest at 16.

regulatory authority has determined that the contract rates are consistent with the avoided cost cap, neither the State authority nor this Commission has authority to revisit those rates on the basis of allegedly changed circumstances.[27]

Washington Power further argues that the Commission already has addressed and rejected the claim that changed circumstances justify revising agreed-upon avoided cost rates. Washington Power, quoting extensively from the preamble to the Commission's regulations implementing section 210 of PURPA, urges that in enacting those regulations, the Commission expressly recognized that basing rates in long-term contracts on avoided cost estimates made at the time of contracting will result in some contracts that will have overestimated avoided costs and some that will have underestimated. Moreover, Washington Power asserts, the discussion in the preamble also demonstrates that the Commission considered and expressly rejected the changed circumstances argument now made by West Penn and concluded instead that QFs, having obtained the certainty of long-term rates, should not be deprived of the benefits of that certainty as a result of changed circumstances.

Washington Power next argues that to the extent that the West Penn Petition claims that sections 292.304(b)(5) and 292.304(d)(2)(ii) of the Commission's PURPA regulations violate section 210 of PURPA by permitting rates in excess of current avoided costs, such challenge to the regulations is untimely and jurisdictionally defective. Washington Power asserts that the regulations became final and nonappealable in 1980 and that West Penn cannot evade that bar by attempting to characterize its challenge as

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27 In support, Washington Power cites, among other cases, Freehold Cogeneration Association, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995) (Freehold).

addressing the implementation of the regulations rather than the regulations themselves.

Fourth, Washington Power disputes that either Connecticut Power or Southern California Edison provides any support for West Penn's claims. Washington Power distinguishes Connecticut Power as involving a challenge under PURPA, not resolved by the courts in prior litigation, to a state law that required rates acknowledged to be above avoided costs. Here, Washington Power argues, the challenged rates were found by the Pennsylvania Commission to be below avoided cost at the time of a legally enforceable obligation, and that determination, as well as the revised milestone dates, was addressed and upheld by the courts.

Washington Power also argues that this case differs from Southern California Edison, because West Penn's claim, raised only after the Power Agreement was signed, that current avoided costs are lower because it no longer needs the Facility's capacity, has been fully litigated through the courts and is no longer pending. Washington Power adds that the Commission's dicta in Southern California Edison expressing concern with the staleness of the data used in that case to determine avoided costs does not support West Penn's position, because the data used to calculate the Purchase Agreement capacity rate were not stale as of the time the contract was signed.

Finally, Washington Power argues that the Facility's dual QF certification as both a qualifying small power production and a qualifying cogeneration facility is irrelevant to the issue of the avoided cost rates under the Purchase Agreement. Washington Power explains that it obtained additional certification as a qualifying small power production facility because the Facility intends to use a waste fuel as its primary energy source.

E. Response of Pennsylvania Commission

Having filed a notice of intervention and reservation of the right to protest on March 29, 1995, the Pennsylvania Commission filed its protest and motion to dismiss on April 3, 1995. In its protest and motion to dismiss, the Pennsylvania Commission details the prior litigation over the Purchase Agreement and asserts that the issues raised by the West Penn Petition have been fully adjudicated before the Pennsylvania Commission, whose resolution of those issues has been left undisturbed by both the Supreme Court of Pennsylvania and the United States Supreme Court. The Pennsylvania Commission contends, therefore, that the doctrine of res judicata (claim preclusion) bars West Penn from relitigating the issues before this Commission.

Characterizing the West Penn Petition as in essence asserting that an alleged change in capacity needs since the time that a legally enforceable obligation was incurred requires revisiting the Purchase Agreement, the Pennsylvania Commission observes that this argument has been raised by West Penn in prior proceedings and has been repeatedly rejected. The Pennsylvania Commission asserts that West Penn now seeks this Commission's assistance in the rescission of prior-adjudicated Pennsylvania Commission orders that have been upheld by all appellate courts. The Pennsylvania Commission further points out that West Penn at the same time also not only now has asked the Pennsylvania Commission to rescind its own orders, notwithstanding the refusal of the United States Supreme Court to overturn them, but continues to challenge before the Pennsylvania courts the state commission's refusal to permit West Penn to relitigate its previously-rejected claims.

The Pennsylvania Commission also argues that under PURPA and our regulations, the issues raised by West Penn

are appropriately determined not by this Commission but at the state level. The Pennsylvania Commission states that in the amici brief filed in September 1994 in response to West Penn's certiorari petition to the United States Supreme Court in a companion case to that involving the Facility, this Commission agreed that the Pennsylvania Commission's actions with respect to the Power Agreement were not inconsistent with PURPA and, in particular, that it was reasonable for the Pennsylvania Commission to calculate the capacity rate as of the date of contract execution. The Pennsylvania Commission asserts that those determinations, now being challenged by West Penn yet again in this proceeding, remain reasonable and within the authority that PURPA delegates to the States. The Pennsylvania Commission urges this Commission to reject West Penn's attempt to have the Commission micromanage the details of PURPA contract administration, requiring the Commission to delve into fact-based issues as to such matters as avoided costs and capacity needs for specific facilities, when our own regulations expressly delegate such matters to the States.

F. Other Responses

On March 29, 1995, Armco Advanced Materials Company, a Business Unit of Armco, Inc. (Armco), a retail customer of West Penn, filed a motion to intervene in support of the West Penn Petition. Armco argues that if West Penn is required to purchase capacity from the Facility--on which, according to Armco, no construction has begun[28]--rates to retail customers would increase substantially and result in substantial economic harm to Armco, which currently consumes approximately five percent of all energy sold by West Penn at retail in Pennsylvania. Armco agrees with West Penn that the

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28 But see supra note 9 (describing parties', disagreement as to whether construction has begun).

Purchase Agreement rates were based on a now outdated capacity expansion forecast from 1986/1987 and that West Penn now does not need the Facility's capacity. Armco further argues that the Purchase Agreement will be a stranded cost that will deter any state or federal effort to open up to competition the West Penn system and thus is not in the public interest.

On March 31, 1995, the West Penn Power Industrial Intervenors (Industrials) filed a motion to intervene in support of the West Penn Petition. Industrials identifies itself as an ad hoc association of energy-intensive industrial customers of West Penn.[29] Industrials agrees with West Penn's claims that the Purchase Agreement's capacity charge of 5.71@/kWh exceeds West Penn's current avoided costs and will cause West Penn's ratepayers to incur excess costs of $962 million over the life of the contract. Industrials further agrees with West Penn that such rate increases would damage the competitive positions of West Penn and its industrial customers.

On April 3, 1995, Allegheny Ludlum Corporation (Allegheny Ludlum) filed a motion to intervene in support of the West Penn Petition. Allegheny Ludlum states that it is a manufacturer of stainless steel and other specialty steel products and is one of West Penn's two largest retail customers. Like Armco and Industrials, Allegheny Ludlum agrees with West Penn that the rates under the Purchase Agreement exceed current avoided costs and that West Penn currently has no need for additional capacity. Allegheny Ludlum contends that the Facility has neither been built nor

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29 Industrials states that its membership for purposes of this proceeding currently consists of Anchor Glass Container Corporation, Corning Incorporated, Ervin Industries, Latrobe Steel Company, Lukens Steel Company, MG Industries, National Roll Company, Owens-Illinois, Inc. and Washington Steel Corporation.

financed and that it is unfair to West Penn's ratepayers to force them to bear the costs of an unneeded power plant so that Washington Power and its investors can reap what Allegheny Ludlum characterizes as windfall profits. Allegheny Ludlum further suggests that forcing the West Penn ratepayers to incur the costs of the Facility will "severely diminish the ability of industrial companies to compete in the marketplace, and . . . effectively threaten the jobs of thousands of residents in southwestern Pennsylvania."[30]

On April 3, 1995, the Cogeneration Association of California (Cogeneration Association) filed a motion to intervene and protest in opposition to the West Penn Petition. Cogeneration Association states that it is an ad hoc association representing the interests of its member companies in several cogeneration companies.[31] It explains that such cogeneration companies are primarily engaged in electrical generation and the sale of steam for enhanced oil recovery operations in California and that they sell electricity pursuant-to long-term contracts. Cogeneration Association argues that granting the relief sought by West Penn would undermine both the sanctity of contracts, relied upon by QFs to obtain financing, and years of Commission precedent, upon which QFs also have relied, concerning the validity and enforceability of QF contracts that have been approved by State regulatory authorities. Cogeneration Association argues that neither PURPA nor the Commission's regulations permit the undoing of valid and binding contracts because of changing market conditions.

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30 Allegheny Ludlum Intervention at 7.

31 Cogeneration Association states that the constituent cogeneration companies include Sycamore, Kern River, Midway Sunset, Mid-Set, Coalinga, Sargent Canyon and Salinas River Cogeneration Companies.

Also on April 3, 1995, National Independent Energy Producers (NIEP) filed a motion to intervene, protest and answer in opposition to the West Penn Petition. NIEP states that it is an association of a variety of publicly-traded and privately-held corporations that develop and operate cogeneration and other wholesale generation facilities that use a broad spectrum of fossil-fueled and renewable technologies, as well as power marketers. NIEP argues that the West Penn Petition presents the Commission with one primary question that is similar to the main issue in NYSEG: can and should the Commission terminate or modify the Purchase Agreement, after it has been voluntarily executed by West Penn and approved by the Pennsylvania Commission, simply because the-contract differs from West Penn's current estimates of avoided costs and its current forecasts of demand on its system? NIEP urges the Commission to reject West Penn's proposal, because accepting it would be inconsistent with PURPA and the Commission's regulations, would destroy the certainty of income stream upon which QF financing is based and would chill development of new generation projects and thereby destroy competition in the wholesale generation market.

NIEP argues, first, that the Purchase Agreement is consistent with PURPA and the Commission's implementing regulations and that PURPA prevents modifications of the Purchase Agreement after it has received approval by the Pennsylvania Commission. In enacting PURPA, NIEP asserts, Congress recognized the difficulty that QFs would have obtaining financing and gave the Commission the authority and responsibility to implement regulations that would further the development of QFs. The Commission, in turn, recognized that it would be virtually impossible to finance QFs without assurances of a steady stream of revenue to cover their fixed costs and accordingly provided in its regulations that QFs could choose to sell power to an electric utility at a pre-determined fixed rate that represents

an estimation of the utility's avoided cost. Moreover, the Commission expressly acknowledged that the rates under the permissible fixed-rate QF contracts may exceed current market prices. NIEP argues that West Penn's interpretation of PURPA and the Commission's regulations essentially would eliminate the fixed-rate option now provided to QFs in the regulations.

NIEP's argument that, PURPA precludes attempts to modify power purchase contracts after the State regulatory authority has approved them is essentially the same as Washington Power's argument on this point.[32] NIEP also cites in support a recent temporary restraining order issued by the United States District Court for the Western District of New York in Kamine/Besicorip v. Rochester Gas & Electric, No. 6:95-cv-06045 (March 20, 1995) (Kamine), in which the court prevented the utility from suspending payment under a power purchase contract with a QF where the utility claimed that the rates exceeded the utility's avoided cost. NIEP states that the Kamine court followed Freehold in determining that a utility was precluded from seeking to modify the rates in its power purchase agreement. NIEP additionally argues that West Penn's request to have the Commission evaluate the rates under the Purchase Agreement (as well as West Penn's present need for the Facility's output) is precisely the kind of regulatory review that is precluded by QFs, exemption from regulation under the FPA that section 210(e) of PURPA provides. NIEP concludes that the only jurisdiction that the Commission has over QF contracts is to ensure that states abide by the Commission's regulations implementing PURPA.

NIEP's second argument is that granting West Penn's requested relief would be bad public policy and would harm

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32 See supra text accompanying note 27.

competition in the generation market. NIEP contends that adopting West Penn's position not only would vitiate QFs' ability to obtain financing through the use of fixed-rate contracts and thus inhibit the construction of new generating facilities but also would undermine the pervasive use of long-term contracts throughout the industry. The result, NIEP argues, would be to reduce competition in the generation markets and increase the cost of generation to consumers.

Fulton Cogeneration Associates (Fulton) filed a motion to intervene on April 3, 1995. Fulton states that it is a New York limited partnership formed for the purpose of constructing a cogeneration facility in Fulton, New York. Fulton explains that it is a QF and that any determination in this proceeding with respect to the validity of QF contracts could affect it. Fulton takes no position on the West Penn Petition and raises no issues.

ANR Pipeline Company (ANR) filed a motion to intervene on April 3, 1995. It states that it is a natural gas transmission company that, pursuant to long-term firm contracts, transports natural gas to a substantial number of cogeneration QFs in New York and New Jersey. ANR asserts that a determination in this proceeding concerning purchase obligations under QFs' contracts with utilities could affect its long-term firm natural gas transportation contracts. ANR takes no position on the West Penn Petition and raises no issues.

On April 4, 1995, the Pennsylvania Office of Consumer Advocate (Consumer Advocate) filed a motion to intervene in support of the West Penn Petition. Consumer Advocate explains that it is a state agency empowered by statute to represent the interests of consumers of utility services in the Commonwealth of Pennsylvania before the Pennsylvania Commission, similar federal regulatory agencies and state and federal courts. Consumer Advocate suggests

that the West Penn Petition raises an unresolved issue regarding the implementation of PURPA's requirements, particularly in view of the Energy Policy Act of 1992 and other developments that have increased competition in the electric utility industry. Specifically, Consumer Advocate argues, the West Penn Petition presents the issue whether PURPA requires a utility to pay a rate for QF power that exceeds current avoided cost when the purchase rates are based on stale data, the utility no longer needs the capacity and the QF remains unbuilt. Consumer Advocate contends that from the perspective of Pennsylvania's consumers, requiring West Penn to purchase the Facility's capacity and energy at rates in excess of avoided cost, now and in the foreseeable future, cannot result in rates that are just and reasonable.

Consumer Advocate argues that while PURPA intended to encourage the development of QFs, it made clear that a utility's ratepayers should not subsidize the utility's mandated purchase of QF power. In this case, Consumer Advocate avers, requiring West Penn to proceed with the Purchase Agreement would violate that balance. Consumer Advocate argues that because the Facility is not built, West Penn's requested relief is not precluded by Southern California Edison or Freehold. Consumer Advocate asserts that those decisions left unresolved the issue presented in this case, which it characterizes as whether PURPA requires West Penn to go forward with a contract that is now known to be for unneeded capacity at rates in excess of current avoided costs. Consumer Advocate acknowledges that it can be argued that West Penn must be required to honor the Purchase Agreement because the delays in the Washington Power project result from West Penn's own actions but nonetheless contends that that would be unfair to West Penn's ratepayers, who will be asked to pay the costs of the contract. Finally, Consumer Advocate argues that the project, if completed, potentially would be stranded

investment and thus would hinder, not foster, the development of competitive generation markets.

On April 5, 1995, PECO Energy Company (PECO) filed a motion to intervene. PECO states that it is an operating utility that provides electric service in southeastern Pennsylvania and northern Maryland. It represents that as an electric utility subject to both PURPA and the Pennsylvania Commission's implementing regulations, which are at issue here, it may be directly affected by the outcome of this proceeding. PECO takes no position on the West Penn Petition and raises no issues.

The Mid-Atlantic Independent Power Producers (Mid-Atlantic Independents) also filed a motion to intervene on April 5, 1995. Mid-Atlantic Independents states that it is a trade association that represents companies and individuals who have interests in the competitive power market in Maryland, Pennsylvania, New Jersey, Delaware, Virginia and the District of Columbia, including members involved in the development of QFs. Because its members are consumers of West Penn's utility services, are competitors of West Penn in the wholesale energy market and are parties to and beneficiaries of the types of QF contracts under PURPA that the West Penn Petition challenges, Mid-Atlantic Independents states that its interest and its members, interests are likely to be directly affected by the outcome of this proceeding. Mid-Atlantic Independents takes no position on the West Penn Petition and raises no issues.

Finally, in addition to the intervening West Penn industrial retail customers already identified, a substantial number of West Penn retail customers, primarily individual ratepayers, have written to the Commission expressing their opposition to Washington Power's project. Most of the letters reached the Commission after the April 5 deadline for filing protests and motions to intervene. We note, however,

that none of the letters constitutes a formal motion to intervene or (as they all support West Penn's position) a protest. The letters are for the most part substantively identical. One letter, filed April 18, 1995, attaches a sheet that sets forth, in abbreviated and highly partisan terms, the "facts" regarding the excess cost of and lack of need for the Facility (as well as the Milesburg and Shannopin QFs). That same version of the facts is reflected both in West Penn's pleadings in this case and in most of the letters from West Penn's retail customers. Thus most of the letters object to requiring West Penn to purchase the Facility's power on the grounds that it is unneeded and overly expensive and that forcing West Penn to buy the power is likely to lead to substantial rate increases for West Penn customers and the risk of job losses in the region because of increased industrial and commercial electric rates.

G. West Penn Answer

On April 17, 1995, West Penn filed an answer (West Penn Answer) to the motions to dismiss of Washington Power and the Pennsylvania Commission.[33] The West Penn Answer also supplements the West Penn Petition by arguing that NYSEG, which was issued after the filing of West Penn's original petition, does not bar the relief requested by West Penn.

In its answer to the motions to dismiss, West Penn argues that, for five specified reasons, its petition is not barred by the doctrine of res judicata. First, West Penn asserts that the doctrine is not applicable in utility rate proceedings, because such proceedings are inherently subject to changes in circumstances. West Penn claims that the

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33 West Penn correctly notes that while our regulations do not permit answers to protests, they do permit answers to motions to dismiss. See 18 C.F.R. §§ 385.213(a)(2)-(3) (1994).

proceedings in this case "ultimately are indistinguishable from a rate proceeding."[34] Second, West Penn claims that the Commission has not applied res judicata where the prior adjudication is based on stale data. For this proposition, West Penn relies on an administrative law judge's opinion addressing decommissioning expenses for a nuclear plant, which West Penn claims are. similar to QF rates.[35] Third, West Penn claims that under the Commission's interpretation of the doctrine of primary jurisdiction, res judicata does not bar West Penn's request for relief from a state court judgment that erroneously interpreted the Commission's regulations. Fourth, West Penn alleges that it has not had a full and fair opportunity to litigate before the Pennsylvania Commission and courts the same cause of action raised by its petition to this Commission. West Penn asserts that its first requested declaration--that a utility cannot be required to purchase power from a QF when the rates exceed the utility's current avoided costs and are based upon eight-year-old data--obviously was never resolved by the Pennsylvania courts because it depends on facts currently available. West Penn adds that whether a QF's recertification and alleged substantial redesign triggers a new avoided cost determination also was not decided by the Pennsylvania courts. Finally, as to res judicata, West Penn argues that the doctrine, even if otherwise applicable to this case, cannot bar the Commission from issuing adjudicative rules--i.e., an interpretation of its PURPA regulations--in its legislative capacity.

West Penn also responds to Washington Power's argument that the Commission lacks jurisdiction to modify the Purchase Agreement. West Penn asserts that neither Freehold nor the Commission's regulations preclude it from

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34 West Penn Answer at 9.

35 West Penn cites the administrative law judge's initial decision in Boston Edison Co., 59 FERC ¶ 63,028 at 65,239 (1992).

interpreting its regulations and finding that the Pennsylvania Commission's modifications of the Purchase Agreement violated federal law. West Penn asserts that it is not asking this Commission to "'second-guess state regulatory authorities, actual determinations of avoided costs."'[36] Rather, West Penn insists, its challenge to the Pennsylvania Commission's actions is consistent with the Commission's statement in Southern California Edison that its role is limited to ensuring that the process used by the state commission to calculate the per unit charge accords with PURPA and this Commission's regulations.

Third, West Penn argues that the preamble to our PURPA regulations did not in fact consider and reject the claim of changed circumstances now asserted by West Penn. West Penn urges that even if Washington Power has correctly interpreted the preamble discussion, this Commission is not bound by the preamble. West Penn adds that, because avoided costs allegedly have declined since the regulations were enacted, the Commission should reject the preamble discussion to the extent that it suggests that changed circumstances will not require reconsideration of QF rates.

West Penn also offers further arguments as to why our decisions in Connecticut Power and Southern California Edison allegedly support its requested relief and as to why Washington Power's dual certification requires recalculation of the Purchase Agreement rates. Finally, West Penn attempts to explain why our recent decision in NYSEG does not preclude granting West Penn its requested relief.[37]

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36 West Penn Answer at 25 (quoting Southern California Edison, 70 FERC at 61,677). We made clear in that case, of course, that we will not engage in such second guessing.

37 West Penn's arguments on these points, to the extent that they are of any substance and relevance, are addressed in our discussion below on

II. Discussion

A. Procedural Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure,[38] the notice of intervention of the Pennsylvania Commission and the timely, unopposed motions to intervene of Washington Power, Armco, Industrials, Allegheny Ludlum, Cogeneration Association, NIEP, Fulton, ANR, Consumer Advocate, PECO and Mid-Atlantic Independents serve to make them parties to this proceeding.

B. West Penn's Requests for Relief

The gravamen of the West Penn Petition is an allegation that the Pennsylvania Commission, in violation of PURPA and this Commission's implementing regulations, modified the Purchase Agreement by calculating the rates based on avoided costs estimated as of the date of the contract's execution and by extending certain milestone dates to take account of litigation delays. Additionally, West Penn asks us, in essence, to declare that PURPA and our regulations require that established rates in long-term QF contracts be recalculated if changed circumstances result in avoided cost projections that differ from earlier avoided cost projections upon which the rates originally were based.

We will deny West Penn's petition. West Penn's complaints about the specific actions taken by the Pennsylvania Commission regarding the Purchase Agreement

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the merits of the West Penn Petition, and we will not,repeat the arguments here.

38 18 C.F.R. § 385.214 (1994).

already have been fully litigated in another forum. We will not entertain an attempt to relitigate before this Commission matters that have been settled by the Pennsylvania courts, whose determinations the United States Supreme Court also declined to disturb. The Pennsylvania Commission's modifications to the Purchase Agreement involve fact-based determinations and PURPA enforcement issues that we consistently have regarded as the province of the States.[39] Moreover, West Penn's attack on our PURPA regulations permitting rates for QF contracts to be calculated as of the time a legal obligation for the sale of power is incurred raises essentially the same issue that we addressed and rejected in NYSEG.[40]

West Penn argues that it really is challenging the "process" by which the Pennsylvania Commission determines avoided costs in general and is not asking us to "second-guess" the Pennsylvania Commission's actual determination of avoided cost for the Facility.[41] By this assertion, West Penn seeks to evade our warnings in Southern California Edison and NYSEG that we would not engage in such second-guessing.[42] West Penn's effort is unsuccessful. Our regulations, expressly permit rates in longterm QF contracts to be based on avoided costs as of the time a legally enforceable obligation is incurred. It is up to the States, not this Commission, to determine the specific

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39 See, e.g., NYSEG, slip op. at 22.

40 West Penn's final argument, regarding the supposed effect of recertification of a QF, is, as we discuss below, essentially a variation on its argument that changed circumstances require recalculation of avoided costs and is, we find, without merit.

41 West Penn Answer at 25-26.

42 See Southern California Edison, 70 FERC at 61,677; NYSEG, slip op. at 22.

parameters of individual QF power purchase agreements,[43] including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts.[44]

One other of West Penn's arguments that merits comment is its claim that its petition is not precluded by our determination, as explained in Connecticut Power and Southern California Edison and confirmed in NYSEG, that we will not accept challenges to State-approved avoided-cost rates unless the rates were challenged prior to the execution of the contract and the challenge is pending. We agree that in this case, West Penn had no reason to challenge the Purchase Agreement prior to the date of execution.[45] We do not agree, however, that West Penn's challenge to the Purchase Agreement as modified by the Pennsylvania Commission is ongoing or pending in the sense that we contemplated in our prior decisions. The only reason that West Penn now can contend that the matter is pending is that it refused to accept the judgments of the Pennsylvania courts and the

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43 See NYSEG, slip op. at 22.

44 Moreover, as we pointed out in our amici brief in the companion certiorari proceedings to those involving Washington Power, we do not find Pennsylvania's determinations on these issues, the resolution of which are State responsibilities, inconsistent with or in violation of PURPA or our regulations. See Pennsylvania Commission Protest Appendix A at 17-20. None of West Penn's arguments in this proceeding persuades us to reverse our earlier view.

45 As all parties agree, the rates as originally set were negotiated by West Penn and Washington Power and were not modified by the Pennsylvania Commission in its initial acceptance of the contract.

Pennsylvania Commission, as left standing by the United States Supreme Court. Instead of accepting the court decisions, West Penn has sought to reopen the issues before this Commission as well as before the Pennsylvania Commission. While West Penn has attempted to fit its petition into certain isolated language in our recent orders, it ignores the intent of those decisions.

In addition to challenging specific Pennsylvania Commission actions affecting the Purchase Agreement, a claim that we have rejected, West Penn also asks this Commission to declare that PURPA and our regulations do not require, and indeed preclude, a utility's purchase of power from a QF when the rates exceed the utility's current avoided costs, the rates are based upon stale avoided-cost data, the utility no longer needs the capacity and the QF is not yet built. In essence, West Penn is arguing that changed circumstances mandate recalculation of rates based on avoided costs as of the time of the new circumstances. Thus West Penn directly challenges our long-standing rule, as set forth in section 292.304 of our PURPA regulations, that rates for a longterm QF contract based on avoided costs calculated as of the time the legal obligation to sell power was incurred continue to comply with statutory and regulatory requirements--including the requirement that QF rates be just and reasonable--even if the rates differ from avoided costs at the time the power is delivered.

West Penn raises essentially the same issue as was before the Commission in NYSEG. As we confirmed in that case, the provisions of section 292.304 allowing long-term fixed rate contracts for QFs--"lock-ins," in West Penn's parlance--mean what they say. As we further explained in NYSEG, in promulgating the regulations, we expressly considered and rejected the argument now made by West Penn that changed circumstances would require resetting of established rates to match the latest avoided cost

determinations. In NYSEG we examined in detail the legal and policy reasons why we would not amend or reinterpret our regulations in response to allegations that current avoided costs have fallen.[46] We will not repeat that discussion here except to confirm our continued adherence to the principles enunciated in NYSEG. While we do not believe that our discussion in NYSEG requires amplification, we will address certain of West Penn's additional arguments in which it attempts to distinguish its petition from issues that we resolved in NYSEG.[47]

First, West Penn claims that a critical factual distinction is that the Facility in this case is neither financed nor built. West Penn argues, therefore, that granting it relief from the Purchase Agreement will not undermine QF financing in general, because "the critical issue from a lender's point of view is stability after the financing is actually provided."[48] West Penn's argument on this point strikes us as somewhat disingenuous. Under West Penn's theory, the purchasing utility would be free to challenge the rates at any time before financing arrangements are completed, so that QF developers could be forced to pursue a "moving target" in attempting to arrange financing. Allowing utility challenges to rates at any point between the time that a legally enforceable obligation is incurred and the completion of financing could involve repeated delays. In any event, our

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46 See NYSEG, slip op. at 20-26.

47 We already have considered and rejected West Penn's arguments that NYSEG and our earlier decisions do not preclude its petition because (a) its challenge to the Purchase Agreement is ongoing, and (b) it is challenging only the "process" of the Pennsylvania Commission. See supra text accompanying notes 41-45.

48 West Penn Answer at 39.

regulations specifically authorize QF rates to be established as of the time a legally enforceable obligation is incurred.

Second, West Penn asserts that it is entitled to relief under Connecticut Power, quoting in support our description of that case in NYSEG. We stated in the latter case that in Connecticut Power, "we found that the rates for purchases from the QF in that case, as a legal matter, may have exceeded avoided costs at the time the rates were imposed, a situation we determined would be in violation of Section 210(b) of PURPA."[49] West Penn argues that it is entitled to relief on the same grounds, because the modified rates under the Purchase Agreement were imposed not in 1987 when the contract was signed but either in 1989 (when the Pennsylvania Commission established the date at which a legally enforceable obligation arose as the date of execution rather than during the negotiation period) or more likely 1992 (when the Pennsylvania Commission modified the rates to reflect avoided costs estimates as of the date of execution). West Penn alleges that the rates exceeded then current avoided costs estimates in both 1989 and 1992.

West Penn has misunderstood our decision in Connecticut Power. That case involved a challenge to a state statute that required QF rates to be set at rates that exceeded avoided costs regardless of when a legally enforceable obligation was incurred. In this case, the rates were set not by statute but were based on a determination, specific to the Purchase Agreement, as to the date at which the legally enforceable obligation was incurred. The fact that the determination as to the specific proper date in this case was made after the date itself is immaterial. For purposes of our regulations, the critical date is the date on which a legally enforceable obligation is incurred, and choosing that date for a

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49 NYSEG, slip op. at 23 (emphasis omitted).

specific QF is the responsibility of the States, not of this Commission.

West Penn's final argument, relating to the dual certification of the Facility as both a cogeneration and small power production QF, borders on the frivolous. The scope of a QF certification proceeding is quite narrow -- it is limited to a determination whether, on the facts presented in the certification application, the facility at issue will comply with the Commission's ownership and technical requirements for QFs. A QF certification proceeding does not address any issues that are unrelated to the limited definitional criteria for QF status.[50] Thus, the Commission's certifications of the Facility did not purport to address the rates and terms upon which West Penn would satisfy its obligation to purchase the Facility's capacity and energy or the time at which that obligation was incurred.

A QF certification or recertification is an entirely separate matter from when, for purposes of calculating avoided costs in accordance with sections 292.304(b)(5) and 292.304(d)(2)(ii) of our regulations, a "legally enforceable obligation" is incurred. The fact that dual certification is obtained for a single facility means only that the facility satisfies the requirements for both a qualifying cogeneration and a qualifying small power production facility. Moreover, recertification reflects the fact that, because QF certifications are issued based on the facts presented in the application at issue, recertification may be appropriate if any of the facts

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50 Midland Cogeneration Venture Limited Partnership, 56 FERC ¶ 61,361 at 62,393 (1991), aff'd mem. sub nom. Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir. 1993) (per curiam), cert. denied, 114 S. Ct. 546 (1993) (Midland). Accord, e.g., Citizens for Clean Air and Reclaiming our Environment v. Newbay Corp., 56 FERC ¶ 61,428 at 62,523-33 (1991) (Newbay).

change.[51] In no sense does a QF certification or recertification ratify or impose modifications on any power sales contract to which the QF is party.

West Penn's invocation of the legislative history of the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 is equally unavailing.[52] West Penn correctly points out that that legislation, which by increasing the permissible size limits under certain circumstances for small power production facilities under PURPA enabled Washington Power to obtain additional certification as a qualifying small power production facility, expressly did not intend to have the effect of requiring the purchase of additional capacity or energy under existing contracts. No such effect, however, resulted in this case. The obligations of West Penn to purchase capacity and energy from the Facility were established by the Purchase Agreement, which continued to govern those obligations after Washington Power's additional certification. Moreover, we note that West Penn incorrectly alleges that after the passage of that legislation, Washington Power converted from a cogeneration facility to a small power production facility.[53] That simply is not true. As our certification orders indicate, the Facility's certification as a qualifying small power production facility was in addition to, not in replacement of, its certification as a qualifying cogeneration facility.[54]

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51 See, e.g., Newbay, 56 FERC at 62,532-33; Midland, 56 FERC at 62,393.

52 See id. at 35-36.

53 Id. at 35.

54 See Cogeneration Recertification, 70 FERC at 64,386 n.1; Small Power Production Certification, 69 FERC 64,296 n.1. We note that West Penn did not intervene in or protest any of Washington Power's QF certification proceedings. See Cogeneration Recertification, 70

As noted above, the Pennsylvania Commission, and the courts, have determined that a valid, legally binding contract exists. Our decision not to disturb the contract has not turned on the factual issue of whether the contract rate required by the Pennsylvania Commission will in fact exceed West Penn's avoided cost over the term of the contract. However, if West Penn believes that this is the case, it should make every attempt to buy out (or buy down) the contract. We would encourage the parties to the contract to consider settling their differences particularly if the facility has not been constructed. Moreover, if this is the case, we believe that both the Commission and the Pennsylvania Commission should encourage such an effort.

We do not believe that there is any significant difference between this situation and that faced by utilities when they find that previously negotiated fuel contracts are no longer competitive due to changes in fuel markets. In the latter situation, we have encouraged utilities to buy out (or buy down) higher-priced fuel contracts in order to substitute lower-priced fuel currently available and we have allowed the recovery of prudently-incurred buy-out/buy-down costs. See Kentucky Utilities Company, 45 FERC ¶ 61,409 (1988).

The Commission is aware today, as it was in 1980 when it adopted its PURPA regulations, that some QF contracts may result in rates above avoided cost over the

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FERC at 64,386; Small Power Production Certification, 69 FERC at 64,296; Cogeneration Certification, 42 FERC at 63,443.

We note that West Penn claims that Washington Power's proposed small power production facility is "substantially different from the proposed cogeneration facility that formed the basis of the Purchase Agreement. West Penn Petition at 33. West Penn similarly alleges that Washington Power made a "substantial redesign of its proposed QF." West Penn Answer at 19. West Penn fails to specify any differences, however, and our QF certification orders reflect no such differences.

term of the agreement, just as some may result in rates below avoided cost. However, as we explained in Connecticut Power, NYSEG and in this order, we do not believe the remedy is to invalidate such contracts, except in narrow circumstances.[55] Rather, we believe the appropriate action is to buy out or buy down such contracts. To facilitate such action, we clarify that if utilities are prudent in buying out or buying down existing power purchase agreements, whether or not with QFs, this Commission will permit the recovery in wholesale rates of a pro rata share of the buy-out or buy-down costs.

The Commission orders:

The relief requested in the West Penn Petition is hereby denied as discussed in the body of this order.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Acting Secretary.

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55 See Connecticut Power, 70 FERC at 61,029-30; NYSEG, slip op. at 23-24.